05-294

Redacted Version – Public Disclosure Permitted

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Qwest Communications International Inc. PETITION FOR FORBEARANCE From Enforcement Of The Commission's Circuit-Conversion Rules As They Apply To Post-Merger Verizon/MCI and SBC/AT&T (Petition For Forbearance Under 47 U.S.C. § 160(c))	WC Docket No. 05-281

PETITION FOR FORBEARANCE

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October 4, 2005

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October 4, 2005

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Request that the Commission Withhold from Public Inspection Certain Portions of Qwest Communications International Inc.'s Petition for Forbearance from Enforcement of the Commission's Circuit-Conversion Rules As They Apply to Post-Merger Verizon/MCI and SBC/AT&T

Dear Ms. Dortch:

On behalf of Qwest Communications International Inc. ("Qwest"), we request that portions of the above-captioned petition for forbearance and accompanying attachments—which contain proprietary commercial and financial information—be withheld from public inspection pursuant to either Section 0.457 or 0.459 (or both) of the Commission's rules.[1]

The original and four copies of the petition and attachments accompanying this letter **have been redacted**, and therefore may be made available to the public. Confidential, unredacted copies have been provided under a separate cover letter. Qwest justifies its request for confidential treatment as follows.

Non-Disclosure Under Section 0.457

The information at issue consists "trade secrets and commercial or financial information,"[2] and it should therefore be protected under Section 0.457. Disclosure of certain of the material in the petition and the attached declaration of Dr. Simon Wilke would risk revealing company-sensitive proprietary information in connection with Qwest's customers and internal

[1] This request applies to the petition itself and to the attached exhibits.

[2] 47 C.F.R. § 0.457(d).

corporate systems and records. Therefore, in the normal course of Commission practice the information should be considered "Records not routinely available for public inspection." This position is buttressed by 47 U.S.C. § 222 and relevant Commission implementing rules, as well as Qwest's internal practices regarding treating customer information as confidential.

Non-Disclosure Under Section 0.459

1. Identification of Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

Qwest seeks confidential treatment of sensitive commercial and financial information relating to its provisioning of special access circuits and the revenues it earns as a result of such leases. If such information were disclosed, Qwest's competitors could determine the extent to which Qwest's competitive position depends on special access circuit leases, and they could likewise assess Qwest's sensitivity to changes in those revenue levels. Moreover, the principles reflected in Sections 222(a) and (b) of the Communications Act, as amended, make clear that the information should be protected from disclosure.[3]

2. Description of Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

The confidential information contained in the above-captioned petition supports Qwest's arguments in favor of forbearance from the Commission's circuit conversion rules as they apply to conversion requests from post-merger SBC/AT&T and Verizon/MCI. In particular, the confidential information demonstrates the anticompetitive harm that the merged entities could cause if they are allowed to force other ILECs to to convert special access circuits to UNE pricing following consummation of the mergers.

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The confidential information contained in the above-captioned petition bears directly on the number of high-capacity special access circuits that Qwest provides to various customers and on the revenues that Qwest earns from those circuit leases. In addition, the above-captioned petition addresses the amount of financial harm that Qwest would suffer in the event that it is obliged to convert those special access circuits to UNE pricing. The confidentiality of this information is critical to Qwest, as it provides an unfiltered view of the extent to which Qwest's business depends on special access leases to certain customers. If this information were not

[3] 47 U.S.C. § 222(a) and (b).

protected under Section 0.459, Qwest's competitors could use it in an effort to determine how best to undercut Qwest's business.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The confidential information at issue relates directly to a service that is subject to competition, and, if the information is not protected, Qwest's competitors will be able to use it to their competitive advantage. As noted above, the information at issue consists of the volumes of high-capacity special access circuits that Qwest provides and the revenues that Qwest derives from those leases. The market for special access circuits is subject to competition, as multiple carriers offer own special access circuits on a wholesale basis. As multiple parties have explained in the Commission's ongoing investigation of special access rates,[4] carriers compete vigorously to lease their special access circuits, and they frequently offer volume and/or term discounts in an effort to lure customers away from competitors. If the confidential information subject to this request is not protected, Qwest's competitors will be able to use it to fine-tune their efforts to pry Qwest's customers away.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

Since this type of information would generally not be subject to routine public inspection, the Commission's rules (47 CFR § 0.457(d)) already contemplate that release of the information likely could produce competitive harm.

Disclosure of the confidential information contained in the above-captioned petition for forbearance would cause substantial competitive harm because Qwest's competitors could determine the extent to which Qwest's competitive position depends on special access circuit leases, and they could likewise assess Qwest's sensitivity to changes in those revenue levels. If this information were not protected under Section 0.459, Qwest's competitors could use it in an effort to determine how best to undercut Qwest's business and lure Qwest's customers away.

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[4] *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Comments of ATX Communications Services, Inc. *et al.* at 35-38 (filed June 13, 2005); Comments of CompTel/ALTS *et al.* at 11-12, 14-17 (filed June 13, 2005); Reply Comments of ATX Communications Services, Inc. *et al.* at 25 (filed July 29, 2005); Reply Comments of Broadwing Communications, LLC and SAVVIS, Inc. at 13, 15 (filed July 29, 2005); Reply Comments of CompTel/ALTS *et al.* at 24-28 (filed July 29, 2005).

6. Identification of Any Measures Taken By Qwest to Prevent Unauthorized Disclosure (Section 0.459(b)(6))

Qwest has never distributed the confidential information to any unauthorized party. Indeed, Qwest's forbearance petition and the attached Declaration of Simon Wilkie have been drafted and reviewed by a small group of Qwest employees, by Qwest's outside counsel handling this matter, and by two economists engaged to provide underlying analysis. And, again, the principles reflected in Sections 222(a) and (b) of the Communications Act, as amended, suggest the information should be protected from public disclosure. [5]

Each page of the unredacted version of the petition is clearly marked in bold-face type "Qwest Proprietary – Not for Public Disclosure," and each page of the redacted version of the petition is clearly marked in bold-face type "Redacted Version –Public Disclosure Permitted."

7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

The confidential information contained in the above-captioned petition is and shall remain unavailable to the public. As noted in part 6 above, Qwest has not previously disclosed any of the confidential information to any unauthorized parties.

8. Justification of Period During Which the Submitting Party Asserts that Material Should Not Be Available for Public Disclosure (Section 0.459(b)(8))

Qwest requests that the unredacted versions of the above-captioned forbearance petition be withheld from public disclosure for a period of 3 years from the date of this request. By that time, the sensitivity of the commercial and financial information will have diminished, as market changes will render it increasingly dated, and would make it difficult for competitors to gauge Qwest's current market position and revenue levels.

9. Other Information that Qwest Believes May Be Useful in Assessing Whether Its Request for Confidentiality Should Be Granted (Section 0.459(d)(9))

As noted, the confidential information contained in the above-captioned forbearance petition would, if publicly disclosed, enable Qwest's competitors to gain an unfair competitive advantage. Moreover, the principles of Sections 222(a) and (b) regarding the protection of confidential customer information support its not being publicly disclosed. In addition, Exemption 4 of the Freedom of Information Act shields information which is (1) commercial or

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[5] 47 U.S.C. § 222(a) and (b).

financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. The information in question clearly satisfies this test.

* * *

For the reasons stated above, Qwest believes that the unredacted version of the above-captioned forbearance petition should be withheld from public inspection. Should you have any questions regarding this request, please contact me by phone at +1 202 730 1300 or by email at jnakahata@harriswiltshire.com.

Respectfully submitted,

John T. Nakahata

Counsel for Qwest Communications International Inc.

Attachments

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Qwest Communications International Inc. PETITION FOR FORBEARANCE From Enforcement Of The Commission's Circuit-Conversion Rules As They Apply To Post-Merger Verizon/MCI and SBC/AT&T (Petition For Forbearance Under 47 U.S.C. § 160(c))	WC Docket No. _____

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Counsel for
Qwest Communications International Inc.

October 4, 2005

Summary

The pending mergers of SBC with AT&T and Verizon with MCI will, if approved, create "MegaBOCs" with enormous capital resources and unprecedented scopes of operation. The companies' post-merger positions in the market will bear no resemblance to that of any other market participant in history (save pre-divestiture AT&T), as both companies will be highly capitalized, possess enormous revenues, control an ILEC home region vastly greater than any of the home regions originally established upon divestiture of the Bell System, and boast established IXC operations and ubiquitous networks.

Permitting the MegaBOCs to marry their market dominance – particularly in the enterprise market – with the unfettered ability to force other ILECs to convert MegaBOC-leased special access circuits to UNEs would subvert congressional intent underlying the Telecommunications Act of 1996, curtail competition, and harm consumer welfare. Specifically, as part of the Act, Congress imposed unbundling obligations on the ILECs to facilitate local market entry by nascent competitive communications service providers.[1] Under the Commission's subsequent orders and current rules,[2] those unbundling obligations extend to "converting" special access circuits already used by competitors to supply services to UNEs at TELRIC prices so long as the circuits are not used exclusively for long distance or wireless service. This practice is often referred to as "circuit flipping." In this Petition, Qwest asks the Commission to forbear from enforcing

[1] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, 15647 (¶ 292) (1996) ("provid[ing] new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces . . . is consistent with the procompetitive goals of the 1996 Act") ("*Local Competition Order*"); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*").

[2] *See, e.g.*, 47 C.F.R. §§ 51.316, 51.318, 51.319.

the ILECs' obligation to convert special access circuits to UNEs when the conversion request is made by one of the new merger-created MegaBOCs.

Obliging ILECs to flip circuits for the merged entities would subvert congressional intent because the MegaBOCs cannot seriously be viewed as "impaired" within the meaning of the 1996 Act in any market, and their own and others' incentives and ability to construct competitive telecommunications facilities would be undermined by a regulatory requirement to convert MegaBOC-leased special access circuits to UNEs. Indeed, if *any* companies have the financial and geographic wherewithal to develop the competing facilities central to the pro-competitive strategy of Congress and the Commission – and therefore do *not* need to piggyback on existing ILEC facilities to avoid "impairment" in entering downstream retail markets – the MegaBOCs are the ones.

In addition to upending the statute, a regulatory handout for the MegaBOCs in the form of a circuit-flipping requirement would produce dire competitive consequences, particularly in the enterprise market. AT&T and MCI already dominate the enterprise arena, and forcing ILECs to convert the MegaBOCs' massive inventories of special access circuits would provide the new companies a cost advantage far surpassing anything available to competitors. Indeed, the sheer size of the post-merger companies would be such that this artificial cost advantage could well contribute to the governmental creation of an enterprise services duopoly. Obliging ILECs to flip special access circuits for their larger competitors would also increase the possibility of "tacit collusion" between the MegaBOCs, to the detriment of competition both within and without their local exchange regions. Finally, forcing carriers to convert the MegaBOCs' leased special access circuits would greatly enhance those behemoths' ability to maintain

market power by using circuit flipping (or the threat of circuit flipping) as an anticompetitive hammer to punish other ILECs attempting to do business in the MegaBOCs' home regions.

The Commission should (and, indeed, must) eliminate this threat to competition by forbearing from the application of the regulatory and statutory provisions that would otherwise oblige BOCs to convert MegaBOC leased special access circuits to UNEs priced at TELRIC rates. Each of the three Section 10(a) criteria is satisfied, the requirements of section 251(c) have been fully implemented (consistent with Section 10(d)), and the Commission must therefore forbear in accordance with the affirmative obligation imposed by Section 10.[3]

Forbearance is Consistent with the Public Interest: Forbearance from the requirement that other BOCs convert MegaBOC-leased special access circuits would serve the public interest under Section 10(a)(3) by preventing those behemoths from hijacking provisions of the Act designed to help nascent, "impaired" competitors gain a foothold in the marketplace. Forbearance would also remove a regulatory obstacle to the efforts of Congress and the Commission to advance *facilities-based* competition by eliminating the new companies' ability to demand circuit conversions rather than investing in facilities out-of-region. Indeed, SBC and Verizon themselves have long recognized that obliging ILECs to supply UNEs in the place of leased special access circuits creates a disincentive to investment in facilities.

Forbearance is also in the public interest because it would prevent the MegaBOCs from using circuit flipping demands as a means of punishing Qwest and other ILECs

[3] *See* 47 U.S.C. § 160(a) (providing that the Commission "shall forbear" if it determines that the statutory criteria have been satisfied).

when they seek to compete in the MegaBOCs' home regions. After the mergers, the MegaBOCs will possess huge inventories of leased special access circuits in Qwest's home territory and other ILECs' territories that the merged entities could threaten in retaliation for efforts to enter the MegaBOCs' home markets. Moreover, requiring circuit flipping for the MegaBOCs would facilitate post-merger tacit collusion and geographical market division between them.

As a result of the MegaBOCs' dominance in the enterprise market, converting their leased special access circuits would provide them a cost advantage that cannot be realized by LECs that do not have such a large embedded base of special access circuits that was purchased and installed to serve long distance customers. By adding a modicum of local traffic to bring circuits into accord with the conversion eligibility requirements, the post-merger MegaBOCs could cut their actual (not per-unit) costs for these facilities nearly in half. Moreover, this negative incremental cost effect will not accrue to the benefit of consumers, because the MegaBOCs are not the highest-cost, marginal suppliers of telecommunications services sold in the enterprise market or other retail telecommunications markets.

The Circuit-Flipping Rules Are Not Necessary to Ensure Just, Reasonable, and Not Unreasonably Discriminatory Charges and Practices: Qwest's Petition also satisfies the second forbearance criterion because, as required by section 10(a)(1), applying the Commission's circuit-flipping rules to MegaBOC conversion requests is not necessary to ensure that the "charges" and "practices" associated with special access circuits are just, reasonable and not unreasonably discriminatory. AT&T and MCI already pay just and reasonable rates for special access services when they purchase them

from ILECs under interstate tariffs. Indeed, if the Commission does not forbear, circuit-flipping will facilitate collusion and thereby tend to raise rates to supra-competitive levels.

Moreover, while forbearing from the obligation that ILECs convert circuits leased by the MegaBOCs would plainly result in *differential* treatment for those carriers vis-à-vis their much smaller rivals (should the MegaBOCs choose to flip circuits rather than construct them or continue to purchase them under tariff), this does not rise to the level of unreasonable *discrimination.* Unreasonable discrimination occurs only when *similarly* situated carriers are both treated differently and unreasonably so – but no other telecommunications carriers in the nation have (1) the vast resources enjoyed by the MegaBOCs; (2) their massive special access circuit inventories; (3) their related ability to distort costs through circuit conversions; (4) the distance advantages given by multiple POPs within local exchange areas; (5) the purchasing power that comes from their vast size; or (6) the ability to retaliate against in-region competitors by converting special access circuits to UNEs. In light of these facts, differential treatment of MegaBOC conversion requests under the Commission's UNE rules is entirely reasonable.

The Circuit Flipping Rules Are Not Necessary for the Protection of Consumers: Requiring ILECs to convert MegaBOC circuits is not necessary to protect consumers; indeed, circuit flipping will reduce consumer welfare, and forbearance is consistent with section 10(a)(2) as a result. Considering that increased competition protects consumers, the fact that forbearance would preserve competition provides direct protection to consumers. Moreover, as Dr. Wilkie's attached Declaration indicates, AT&T and MCI are "inframarginal" suppliers of telecommunications services sold to enterprise customers

– in other words, their "marginal costs of production are lower than the marginal production costs of the highest-cost (or 'marginal') suppliers" in that market.[4] As a result, converting MegaBOC-leased special access circuits post-merger will not result in lower prices for customers – flipping will merely increase the profits of the new merged entities while eviscerating their incentives to make facilities-based investments.[5]

In addition, as noted above, requiring ILECs to convert MegaBOC-leased special access circuits to UNEs would stifle competition in the MegaBOCs' home regions by enabling those behemoths to discourage other ILECs – including Qwest – from providing service there.[6] Ultimately, telecommunications consumers would suffer from higher rates, reduced choice, and less innovation as the MegaBOCs effectively create in-region monopolies and out-of-region duopolies for bundled telecommunications services.

The Requirements of Section 251(c) Have Been Fully Implemented: The Commission should forbear from applying its circuit flipping rules because the "fully implemented" requirement of section 10(d) has been satisfied. More specifically, the requirements of Section 251(c) have been incorporated into the competitive checklist in Section 271(c), so the Commission's approval of Qwest's Section 271 applications in all of its states necessarily includes a finding that Section 251(c) has been "fully implemented."

In sum, pursuant to Section 10(c) of the Communications Act, 47 U.S.C. § 160(c), Qwest asks the Commission to forbear from enforcement of Commission Rules 51.309, 51.315, 51.316 and 51.318 to the extent those provisions would force ILECs to convert

[4] Declaration of Simon Wilkie ¶ 25 (attached as Exhibit A) ("Wilkie Declaration").

[5] *See id.* ¶¶ 25-28.

[6] *See id.* ¶¶ 47-49.

MegaBOC-leased special access circuits to UNEs.[7] Qwest also asks the Commission to "re-convert" to tariffed rates all circuits converted for SBC/AT&T or Verizon/MCI between the date of this Petition and the date of grant, retroactive to the date on which this Petition was filed. Qwest seeks this forbearance only with respect the post-merger entities. If one or both of the mergers fails to occur, Qwest will withdraw this Petition as to the non-merging parties.

[7] *See* 47 U.S.C. § 251(c)(3); 47 C.F.R. §§ 51.309, 51.315, 51.316, 51.318.

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PETITION FOR FORBEARANCE

The pending mergers of SBC with AT&T and Verizon with MCI will, if approved, create "MegaBOCs" with enormous capital resources and unprecedented scopes of operation. The companies' post-merger positions in the market will bear no resemblance to that of any other market participant in history (save pre-divestiture AT&T), as both companies will be highly capitalized, possess enormous revenues, control an ILEC home region vastly greater than any of the home regions originally established upon divestiture of the Bell System, and boast established IXC operations and ubiquitous networks. Indeed, the MegaBOCs will be by far the best-endowed carriers in the country, consisting of:

- The number one and number two local exchange carriers, by lines and revenues, dwarfing number three;
- The number one and number two enterprise voice and data providers, dwarfing number three;
- The number one and number two wireless providers, dwarfing number three;

- The *only* carriers combining large IXC operations (including mature Internet backbone businesses) with BOC operations (including rapidly growing high-speed Internet access businesses); and
- The number one and number two communications companies by combined 2004 EBITDA, both more than double the 2004 EBITDA for BellSouth, and even further beyond Qwest, Sprint, or Comcast (the largest cable operator).

The impact of these mergers in the enterprise market will be particularly significant. AT&T and MCI have long occupied the number one and number two positions in that market and, according to a recent analyst report, are "still generally regarded as the only two providers that [have] the global reach and breadth/flexibility of solutions required to service large multinational corporations."[8] The number one and two up-and-coming challengers in the enterprise market were, of course, SBC and Verizon.[9] Accordingly, the mergers – if approved – will cement the MegaBOCs as the dominant suppliers in the enterprise market, far ahead of Sprint, BellSouth, and Qwest. In that critical market, the merged entities will have both the market power and the incentive to stifle their overmatched competitors.

This Petition is targeted to: (1) limiting the competitive harms that the mergers will produce if the Commission's rules force Qwest and other local exchange carriers ("LECs") to provide the merged entities with regulatory opportunities unavailable to their competitors; and (2) ensuring that regulation does not reduce or even eliminate the economic incentives of the merged companies, as well as other carriers, to make facilities-based investments. In particular, Qwest asks the Commission to relieve Qwest and other LECs of the duty to convert the merged companies' special access circuits to

[8] Jeffrey Halpern (Sanford Bernstein Research), A Tough Nut to Crack III: Consolidation Bypasses Inexorable Share Shifts: Results from the 2005 Bernstein Enterprise Telecom Decision-Maker Study at 12 (August 2005) ("Sanford Bernstein Enterprise Report") (attached as Exhibit B).

[9] *Id.* at 12-13.

unbundled network element ("UNE") pricing. Requiring Qwest and other LECs to convert the MegaBOCs' circuits would further leverage the MegaBOCs' already-dominant positions in the enterprise market and also enable them to threaten such conversion to discourage other ILECs from entering and competing in the merged companies' home regions. As explained in the accompanying Declaration of Professor Simon J. Wilkie, such actions would harm consumer welfare. Requiring Qwest and other LECs to convert the MegaBOCs' leased special access circuits to UNE pricing would have the predictable effect of discouraging the new industry giants from building out the network facilities at the heart of the FCC's (and the Congress's) policy of encouraging facilities-based competition. That result would be particularly troubling given that SBC and Verizon both touted new facility construction as a major benefit of the mergers.

Qwest accordingly asks the Commission to forbear under Section 10 of the Communications Act (as amended) from the rules that would otherwise force Qwest and other LECs to "flip" the MegaBOCs' leased high-capacity special access circuits to unbundled network elements subject to TELRIC pricing. Qwest also asks the Commission to "re-convert" to the appropriate tariffed service class any special access unbundled network elements that the MegaBOCs purchase or convert between the date of this filing and the effective date of its grant. Qwest seeks this forbearance only with respect to its duty (and the duty of other LECs) to flip circuits leased by the merged entities and only upon consummation of either or both of the mergers.

I. INTRODUCTION AND OVERVIEW

Permitting the MegaBOCs to marry their market dominance with the unfettered ability to convert special access circuits to UNEs would subvert the Communications

Act, curtail competition, and harm consumer welfare. Congress intended the unbundling provisions of the Telecommunications Act of 1996 to facilitate local market entry by nascent competitive communications service providers.[10] Requiring Qwest and other LECs to convert the MegaBOCs' leased special access circuits would subvert congressional intent because the MegaBOCs could not seriously be viewed as "impaired" within the meaning of the 1996 Act in any market, and their own and others' incentives to construct competitive telecommunications facilities would be undermined by their ability to flip special access circuits. Indeed, if *any* companies have the financial and geographic wherewithal to develop the competing facilities central to the pro-competitive strategy of Congress and the Commission – and therefore do *not* need to piggyback on existing ILEC facilities to avoid "impairment" in entering downstream retail markets – the MegaBOCs are the ones.[11]

In addition to upending the statute, forcing Qwest and other LECs to give the merged entities a regulatory handout under the circuit-flipping rules would produce dire competitive consequences, particularly in the enterprise market. AT&T and MCI already dominate the enterprise arena, and requiring Qwest and other LECs to flip their massive inventories of special access circuits would provide them a cost advantage far surpassing anything available to competitors. Indeed, the sheer size of the post-merger companies

[10] *See, e.g., Local Competition Order*, 11 FCC Rcd. at 15647 (¶ 292) ("provid[ing] new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces . . . is consistent with the procompetitive goals of the 1996 Act"); *USTA II*, , 359 F.3d at 576.

[11] Qwest does not contend that the test for forbearance under Section 10 of the Act merely mirrors the impairment test. Given Section 10(b)'s focus on whether forbearance "will enhance competition among providers of telecommunications services," however, the fact that the MegaBOCs will *not* be impaired without access to UNEs helps to underscore the propriety of granting this Petition. *See Unbundled Access to Network Elements,* Order on Remand, 20 FCC Rcd. 2533, 2620-29 (2005) ("*TRRO*") (making a similar finding regarding impairment in unique geographic situations).

would be such that this artificial cost advantage could well contribute to the governmental creation of an enterprise services duopoly.

Moreover, the effects of this duopoly would be felt not solely in the enterprise market – it would have a pronounced impact on the structure of the market for communications services more generally. While large enterprises account for only about one-fourth of total retail telecommunications services revenues today, a recent analyst report concludes that such businesses "will drive more than *one-half* of the industry's growth over the next five years."[12] As that analyst noted, "superior growth prospects make the enterprise market a key strategic battleground for the major telecom carriers."[13] Forcing Qwest and other LECs to convert the MegaBOCs' leased special access circuits would also increase the possibility of "tacit collusion" between them, to the detriment of competition both within and without their local exchange regions. Finally, requiring Qwest and other LECs to convert the MegaBOCs' special access circuits would greatly enhance the MegaBOCs' ability to maintain market power by using the threat of circuit flipping as a hammer to punish other ILECs attempting to do business in the MegaBOCs' home regions.

The Commission should (and, indeed, must) eliminate this threat to competition by forbearing from the application of the regulatory and statutory provisions that would otherwise compel Qwest and other LECs to convert the post-merger MegaBOCs' leased special access circuits to UNEs priced at TELRIC rates. Each of the three Section 10(a) criteria is satisfied, the requirements of section 251(c) have been fully implemented

[12] Sanford Bernstein Enterprise Report at 15 (emphasis added).

[13] *Id.*

(consistent with Section 10(d)), and the Commission must therefore forbear in accordance with the affirmative obligation imposed by Section 10.[14]

Forbearance is Consistent with the Public Interest: Forbearance from application of the circuit-flipping rules in this context would serve the public interest under Section 10(a)(3) by preventing the distorted application of statutory provisions designed to help nascent, "impaired" competitors gain a foothold in the marketplace. Moreover, requiring Qwest and other LECs to convert the MegaBOCs' circuits would undermine the efforts of Congress and the Commission to advance *facilities-based* competition by undercutting the MegaBOCs' incentives to construct facilities out-of-region.[15] SBC and Verizon have themselves recognized as much – they have long argued that allowing carriers to convert special access lines to UNEs creates a disincentive to investment in facilities.[16]

Forbearance is also in the public interest because it would prevent the MegaBOCs from using Qwest's duty (and other LECs' duty) to convert circuits as a means of punishing Qwest and other ILECs when they seek to compete in the MegaBOCs' home regions.[17] After the mergers, the MegaBOCs will possess huge inventories of leased special access circuits in Qwest's home territory and other ILECs' territories. To the extent that Qwest, for example, takes steps to compete aggressively in SBC's home region, the SBC-AT&T MegaBOC could threaten to flip its special access circuits in

[14] *See* 47 U.S.C. § 160(a) (providing that the Commission "shall forbear" if it determines that the statutory criteria have been satisfied).

[15] In other contexts the Commission has recognized that the availability of UNEs at TELRIC prices when impairment does not exist significantly depresses the construction of competitive facilities. *See, e.g., TRRO*, 20 FCC Rcd. at 2641-42 (¶ 199).

[16] *See infra* Section III.B.

[17] *See* Wilkie Declaration ¶¶ 47-49.

Qwest's territory, instantly cutting Qwest's revenues for those circuits nearly in half. Because of AT&T's enormous count of special access circuits in Qwest's region (and in other ILECs' regions), this type of "punishment" could devastate competitors, with the result that the credible threat of MegaBOC circuit flipping could prevent providers from offering competing services within the MegaBOCs' territories.[18] Moreover, enforcing Qwest's circuit flipping duty in this context would facilitate post-merger tacit collusion and geographical market division between the two MegaBOCs.

Requiring Qwest and other LECs to convert the MegaBOCs' circuits would also preserve and expand their current dominance in the enterprise market. Since enterprise service is increasingly national in scope and since enterprise customers place great value on existing relationships,[19] emerging competitors generally have difficulty gaining entry into the enterprise market. Indeed, two companies – AT&T and MCI – dominate the national market today with a combined 58 percent market share for enterprise voice and 63 percent for enterprise data.[20] According to analyst Sanford Bernstein, their merger partners – SBC and Verizon – are the closest challengers in the enterprise market,[21] meaning that the MegaBOCs' shares will be even greater post-merger.

As a result of the MegaBOCs' dominance in the enterprise market, Qwest's circuit-flipping obligations under the rules would provide the MegaBOCs with a cost advantage that cannot be realized by LECs that do not have such a large embedded base of special access circuits that was purchased and installed to serve long distance

[18] As discussed *infra* at 17-18, SBC has already taken significant steps to erect barriers to competition from Qwest in SBC's region.

[19] *See* Sanford Bernstein Enterprise Report at 41.

[20] *See id.* at 12.

[21] *See id.* at 12-13.

customers. By adding a modicum of local traffic to bring circuits into accord with the eligibility requirements and then "flipping" the circuits to TELRIC prices, the post-merger MegaBOCs could qualify their leased special access circuits for flipping. If Qwest and other LECs were required to convert them under the rules, the MegaBOCs' actual (not per-unit) costs for these facilities would be cut nearly in half. Moreover, as explained further below, this negative incremental cost effect will not accrue to the benefit of consumers, because the MegaBOCs are not the highest-cost, marginal suppliers of telecommunications services sold in the enterprise market or other retail telecommunications markets. In this circumstance, LECs' circuit-flipping obligations under the rules serve only to transfer money from LECs such as Qwest and BellSouth to the MegaBOCs, making it even more difficult for those smaller ILECs to generate the capital necessary to challenge MegaBOCs effective duopoly in the nationwide enterprise market.

The Circuit-Flipping Rules Are Not Necessary to Ensure Just, Reasonable, and Not Unreasonably Discriminatory Charges and Practices: Qwest's Petition also satisfies the second forbearance criterion because, as required by section 10(a)(1), enforcing the Commission's circuit-flipping rules is not necessary to ensure that the "charges" and "practices" associated with special access circuits are just, reasonable and not unreasonably discriminatory. AT&T and MCI already pay just and reasonable rates for special access services when they purchase them from ILECs under interstate tariffs. Indeed, if the Commission does not forbear, Qwest's (and other LECs') circuit flipping duty will facilitate the MegaBOCs' collusion and thereby tend to raise rates to supra-competitive levels.

Moreover, while forbearing from the circuit-flipping rules would plainly result in *differential* treatment for SBC and Verizon vis-à-vis their much smaller rivals (should the MegaBOCs desire to flip circuits rather than construct them or continue to purchase them under tariff), this does not rise to the level of unreasonable *discrimination.* Unreasonable discrimination occurs only when similarly situated carriers are both treated differently and unreasonably so – but no other telecommunications carriers in the nation have (1) the vast resources enjoyed by the MegaBOCs; (2) their massive special access circuit inventories; (3) their related ability to distort costs through circuit flipping; (4) the distance advantages given by multiple POPs within local exchange areas; (5) the purchasing power that comes from their vast size; or (6) the ability to retaliate against in-region competitors using circuit flipping. In light of MegaBOCs' dominant market positions (especially in the enterprise market) and the unique public policy and competitive harms that their "circuit flipping" would present, differential treatment under the Commission's UNE rules is entirely reasonable.

The Circuit Flipping Rules Are Not Necessary for the Protection of Consumers: Enforcing Qwest's (and other LECs') duty to convert the MegaBOCs' circuits is not necessary to protect consumers; indeed, circuit flipping will reduce consumer welfare, and forbearance is consistent with section 10(a)(2) as a result. Considering that increased competition protects consumers, the fact that forbearance would preserve competition provides direct protection to consumers. Moreover, as Dr. Wilkie's attached Declaration indicates, AT&T and MCI are "inframarginal" suppliers of telecommunications services sold to enterprise customers – in other words, their "marginal costs of production are lower than the marginal production costs of the highest-cost (or 'marginal') suppliers" in